IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's Order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No. 1020 of 2001

(Old No. 534 of 1982)

Raghubar Singh & another

Versus

State

Date of decision :-4 March 2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :-4.3.06 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARACHAL
AT NAINITAL

Criminal Appeal No. 1020 of 2001
(Old No. 534 of 1982)

1. Raghubar Singh
S/o Roop Singh
R/o Village Thuamoni, Patti Chaura Kot,
District – Pithrogarh.

2. Har Singh **(Died during the pendency of appeal)**
S/o Roop Singh
R/o Village Thuamoni, Patt Chaurakot,
Thumoni District – Pithoragarh ….Appellants

Versus

State of Uttaranchal ….Respondent

Sri Rajendra Kotiyal, learned counsel for the appellants
Sri A. Rab, Additional G.A. for the State

Hon'ble J.C.S. Rawat, J.

1. The present appeal has been directed against the judgment and order dated 03.02.1982 passed by Sri K.C. Singh, the then Sessions Judge Pithoragarh in Sessions Trial No. 18 of 1977 convicting the appellants u/s 326/34 I.P.C. and sentencing him to undergo three years imprisonment. Feeling aggrieved by the said judgment and order the present appeal has been preferred.

2. Brief facts for the disposal of this appeal are that on 19.10.1975 at about 10:00 a.m. the complainant Prahlad Singh went to the water tank of his village at about 11:00 a.m. to wash his face and hand. The accused-appellants whose fields are nearby the tank started hurling abuses on the injured Prahlad Singh. The injured Prahlad Singh protested the same. Thereafter the father of the appellants thrown stone from the above which hits the injured on his head and it began to bleed. Then the father of the appellants as well as the appellants came near to the injured and caught hold him. While the injured was trying to get himself released, he heard the voice of

Raghubar Singh who was exhorting that the injured should be killed. Thereafter, Raghubar Singh-accused gave a blow with 'Bariath' (a Sharp edged weapon) as a result of which the injured suffered an injury in his right shoulder. Immediately, Harak Ram and Soban Ram arrived there and raised alarm. When the accused saw Harak Ram and Soban Ram coming towards the place of occurrence the accused fled away from the spot.

3. The injured was brought to the hospital by Trilok Singh cousin brother of the injured. He prepared the written report Ex.Ka.2 and handed over to the patwari, Chamawat. Thereafter FIR was lodged by the brother of the injured on the next date at Lohaghat at about 3:00 p.m. Thereafter the investigation was conducted by the Patti Patwari. The injured was examined by Dr. Prem Singh Chandalia-PW5 on the same evening at about 7:30 p.m. He was the medical officer. He found the following injuries on the person of the injured:-

> *1. Incised wound 7" x 2" X bone deep on tip of right shoulder join extending from acromion process towards scapula, severe bleeding was found present. Head of humerus was found exposed and vessels were found bleeding. The whole part was swollen and the movement of shoulder joint was not possible. Radial pulse was pulpable. The margins of the wound were sharp and blood clots blackish in colour were found present.*
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> *2. Incised wound 1" x ½" x ¼" on left perital bone, bleeding.*
>
> *3. The injured complained of pain in his back but no mark of external injury was found present.*

4. The Doctor has opined that injury No.1 cannot be caused by some sharp edged weapon. Doctor referred the injured for the X-ray of his shoulder joint. The X-ray (Ex.Ka.-11) was conducted by Dr. P. Guha-PW8. It is the report of the doctor and it has been proved by the secondary evidence by Sri Marhai Singh Gangwar-PW9. The Doctor has opined that dis-location was found on the shoulder. The Investigating Officer after completing the investigation submitted the chargesheet before the court.

5. The accused-appellants were charged u/s 307 read with 34 I.P.C. and they denied the charges levelled against them and claimed trial. During the pendency of the appeal, the appellant No.2 Har Singh had died on 12.04.2003. The appeal has already been abated against the appellant No.2-Har Singh vide court's order dated 26.10.2005.

6. The prosecution in support of his case produced the evidence of PW3-Prahlad Singh injured, PW4- Soban Ram who is alleged to be the eyewitness, PW1- Ram Singh is the witness of the recovery of a shirt and a towel and recovery memo thereof was prepared in his presence by Patwari on 21.10.1975. PW2-Trilok Singh, brother of the injured is the subscriber of the F.I.R. and he has proved the F.I.R. PW5 Dr. Prem Singh Chandalia proved the medical certificate produced by the prosecution in support of the injuries of Prahlad Singh-injured. PW9-Sri Marhai Singh Gangwar who is X-Ray Technician, Distt. Hospital Pilibhit has proved the X-ray of the injured. PW7- Patwari Kalyan Singh has investigated the case and submitted the chargesheet. PW8-Dr. P. Guha was also produced by the prosecution to prove that the injury No. 1 of the injured could sustained by sharp edged weapon, PW6-Constable Khark Singh has been examined to prove the loss of case diary part (1) in which the statement u/s 161 Cr.P.C. of

the witnesses had been recorded. He has stated that he tried to trace out the duplicate case diary but he could not find out and he proved the loss of the part (1) case diary.

7. The appellants were examined u/s 313 Cr.P.C. and they stated that the witnesses are under the influence of the injured Prahlad Singh and they had falsely been implicated due to the enmity. It was further stated that in the year 1972 Prahlad Singh had thrown acid on Godawari and Bhagirathi, the sisters of Har Singh-accused/appellant. It was further stated that on the date of occurrence Prahlad Singh began to outrage the modesty of his Sister Bhagirathi Devi near the Tank, she caught hold of him. Trilok Singh came at the spot and he tried to assault with sharp edged weapon at Bhagirathi Devi in order to shield Prahlad Singh which his Prahlad Singh. It is also alleged in the statement that the house of Prahlad Singh and Trilok Singh is nearly situated to the water tank. The complainant is rich and influential person so he has implicated the accused/appellant in this case.

8. The defence has alos examined DW1- Bhagirathi Devi in support of his defence set up by the appellants. Certain documents were filed in support of his defence. These documentary evidence have not been proved by the defence as such the learned Sessions Judge excluded them from the consideration during the trial because these documents had no evidentiary value in the case.

9. The learned trail court after appraisal of the evidence on record found the appellant guilty u/s 326/34 I.P.C. and convicted and sentenced the appellants as mentioned above.

10. I have heard learned counsel for the parties and perused the record.

11. The injured Prahlad Singh-PW3 and Soban Singh-PW4 had stated in their evidence as narrated in para-2 of my judgment.

12. Learned counsel for the appellant contended that PW6-Khark Singh and PW7-Kalyan Singh have stated in their statement that Naib Tahsildar has issued instruction to them to record the statement u/s 161 Cr.P.C. in part (1) of the case diary and in compliance of the said instruction PW7-Kalyan Singh recorded the statement of the prosecution witnesses u/s 161 of the Cr.P.C. It was further contended that the witnesses PW6-Kharak Singh and PW7-Kalyan Singh had proved that part (1) of the case diary is not available even after a thorough search of the said diary. It was also contended that the appellant had demanded the copies of the said papers but these papers were not given to them. It was further contended that the defence had been prejudiced by not supplying of the copies of the said statement recorded u/s 161 Cr.P.C. by the I.O. in part (1) diary. The learned A.G.A. refuted the contention. It was further contended by the learned A.G.A. that the prosecution had proved the charge against the appellant beyond reasonable doubt. The learned Sessions Judge had held at para 22 of his judgment that the copies of the case diary had already been supplied to the defence in the court. The finding of the learned Sessions Judge is against the record. Perusal of the ordersheet dated 19.08.1980, 19.09.1980 and 27.03.1981 clearly reveals that the learned Sessions Judge himself had admitted that copies of the said statements had not been given. The finding is against the record. On the back of the chargesheet it has been written by the learned counsel for the defence that he had received the copies of the entire case diary except page nos. 2,4,6 & 8. Learned counsel for the defence time and again prayed that the copies of the statement of witnesses recorded in said diary may be made available to

them. The learned Sessions Judge directed the prosecution to furnish the copies of the said documents but it was never given to the defence. Learned Sessions Judge on 19.08.1980 had observed that it is very unfortunate that the case diary is missing and defence is being naturally put to harassment. The Deputy Commissioner, Pithoragarh and the Deputy Supdt. of Police Incharge, Pithoragarh were directed to take necessary action for the production for the case diary and the case was listed 19.09.1980. Again on 19.09.1980, the Sessions Judge passed the detail order on the ordersheet stating that inspite of the ample search, the first part of the register containing statements u/s 161 could not be found and its duplicate copy is also not traceable. It was further observed that a long date for recording of the evidence may be fixed and meanwhile the copies of the missing document may be traced out and adjournment was made on the payment of Rs. 50/- to the State and the case was listed for 20.10.1980. Thereafter several dates were fixed but the said case diary or its duplicates could not be produced before the court. Thereafter the learned Sessions Judge passed a detailed order on 27.03.1981 which is as under:-

"Heard Sri Jiwan Lal Chaudhar, who says that that the accused persons be acquitted as the copies of statements of witnesses recorded u/s 161 Cr.P.C. have not been furnished and so if the case is proceeded they will not have an opportunity to contradict the witnesses with their previous statements and will be greatly prejudiced. I see no such legal provision that if the case diary is lost the witnesses can not be examined. In my order of 19th Sept. 1980 I had observed "It is not the stand of State counsel that since the case diary is not available he will go for trail with the handicap in absence of case diary because had that been the position the accused my have been asked to stand trial with the knowledge that the copies of statement u/s 161 Cr.P.C. are not available and then

he should have pressed for such benefits at the stage of trial to which he may be legally entitled in case of absence of case diary." I had then given one more opportunity to the State counsel to search out the case diary and furnish copies of statements recorded u/s 161 Cr.P.C. on payment of Rs. 30/-as costs. Thereafter, on 21.02.1981 State counsel moved application that that part of the register in which the statement u/s 161 were recorded is no linger available. Accused have already been given copies of statement which were recorded in the court of C.J.M. Even the carbon copy of para one of case dairy is not missing. He, therefore, stated that in absence of that report on the basis of remaining part of case diary the case be ordered to proceed. Thus he requested that the case be proceeded with in absence of that portion of case diary in which statements u/s 161 Cr.P.C. were recorded. Sr. J.L. Chaudhary for the accused had on that day moved application that keeping in view the Court's earlier order dated 19th Sept. 1980 it would be necessary that the case must proceed even when the case diary and its copies meaning thereby the portion of case diary containing statements u/s 161 Cr.P.C. are not available. He had also prayed for Rs. 50/- as costs per day for all previous dates and to adjourn the case sine die. I then passed order on this application. "This application is misconceived and there is no justification for costs. If the case diary is not available the State can not furnish its copies and so the date for evidence is now being fixed on the application of State. Rejected." On the application of the State counsel to-day's date was fixed for evidence. In view of this background the application of Sri. J.L. Chaudhary for acquitting the accused because the copies of statement u/s 161 Cr. P.C. has not been furnished is totally misconceived and is rejected."

13. The record clearly reveals that copies of the statement recorded in part (1) case diary were not given to the appellant.

14. It is very uncommon that the case diary is maintained in two parts. The Investigating Officer always maintains the case diary in one part. This is the first case in my experience as well as in the experience of the learned Addl. G.A. that two parts consisting of (1) and part (2) of the case diary had been maintained by the Investigating Officer. It is also against the rules and regulation contained in the police and rules manuals. The Naib Tahsildar who had instructed to maintain the part (1) and part (2) case diary had not been produced before the court below to substantiate this fact. It is also pertinent to mention here that that PW7-Kalyan Singh has himself stated that he was present at the hospital on 20th and he took the statement of the doctor. He had not examined the injured on that day. If he was present, he should have examined, injured Prahlad Singh on the same day. It is also astonishing fact that blood stained shirt as well as towel were recovered on the next day, i.e. on 21.10.1975 and not on 20.10.1975 when the pati patwari was there and making the investigation of the case. It may be argued that merely recording the statement after delay of two days may not be fatal to the prosecution and it may also be said that the defence should have put some question with regard to the delay. It is also interesting in this case that the investigation Officer has stated that he was aware that he had to take the statement u/s 161 Cr.P.C. of the injured and he had informed the injured on 20.10.1975 that he would take his statement on the next date. This also creates a doubt in the prosecution story. Here the defence had taken a plea that the injuries were not caucused by the appellant but they had stated that Prahlad Singh tried to outrage the modesty of Bhagirathi Devi at the water tank. But Bhagirathi Devi caught hold of him. The brother of Prahlad Singh-injured, Trilok Singh came in the rescue of his brother with ‘Bariath’ and tried to cause hurt of Bhagirathi Devi by

'Bariath' but it hit the injured instead of Bhagirathi Devi. It is also in the evidence of PW1- Ram Singh who is the witness of the recovery that PW7- Kalyan Singh was also present when he was admitted to the hospital on 19th. Thus it does not reason to believe that why the blood stained clothes were not recovered on the date of occurrence and why the statement of the injured was not recorded on that date. The defence counsel contended that as a matter of fact the I.O. recorded the statement of the injured in part-A case diary and the injured stated the correct version of the incident and its was containing the fact that Trilok Singh tried to cause the injuries to Bhagirathi to shield his brother from her clutches but it hit the injured instead of Bhagirathi. Learned counsel for the appellant further pointed out that the prosecution with the influence of the injured concocted the false case on the next day and as such statement was re-recorded on the next day, i.e., on 21.10.1975 and the recovery of the shirt was also made on the same day. It was further pointed out that to concoct the story the prosecution divided the case diary into two parts and to conceal the real story the said case diary was initially not produced before the court. To shield the injured and to concoct a false story against the appellant, the I.O. divided the diary into two parts and concealed the first part from the court and produced the second part of the case diary. It was further pointed out that it is unusual to divide a case diary into two parts. The fact and circumstance reveals that it is mysterious till today what was written in the first part of the case diary. It had not been produced before the court. It leads to take the inference that the version of the defence is correct. This fact also fortified by not producing the case diary before the court. The defence has taken a plea that non-production of the case diary and non-receipt of the statement recorded in part (1) case diary is fatal to the prosecution.

15. In **Rajit Singh Vs. State, 1971 Cri. L.J. 1255** the court acquitted the accused on the ground that the appellant was prejudiced by not supplying he copy of the dying declaration. The accused time and again applied for supply of the copy of the document but he was denied. In such circumstances the court came to the conclusion that the prosecution deliberately withheld the document and prejudice was caused. In this ruling the statement of the prosecution witnesses were recorded u/s 164 Cr.P.C. but these statements could not be made available to the accused for cross examination as they were not traceable. The Hon'ble Supreme Court has held that the appellant was handicapped in his defence and they were acquitted on that score.

16. In **Sher Singh & others Vs. State in Criminal Appeal No. 725/2001 decided on 16.12.2004** by the Division Bench of this court wherein it has been held that the dying declaration being a previous statement was not made available to the defence. The appellant had a right to cross-examine the witnesses with reference to the previous statement. The Division Bench of this Court came to the conclusion that the accused was liable to be acquitted. It was further held in that case, the evidence was also not reliable. Similarly in this case, the evidence which has been discussed is not cogent and reliable and as such the accused is entitled to be acquitted.

17. It is admitted in the cross examination of PW3-Prahlad Singh that there is long standing enmity in between the parties and it is also admitted Prahlad Singh injured was acquitted in a case in which he was charged that he outraged the modesty of the sisters of the appellant. It is also on record that the complainant-Prahlad Singh was challaned to assault both the sisters of the appellant by throwing acid on their face and he was also acquitted in this case. It is also in the evidence that

the witnesses PW4-Soban Singh, Kharak Singh- PW6 and Trilok Singh-PW2 were also accused in that case. This fact reveals that there is long standing enmity between the parties. It is also in the evidence of PW1-Prahlad Singh that PW4-Soban Singh and PW6-Kharak Singh reached at the spot immediately after the incident. It is also in the evidence of PW3-Prahlad Singh that the incident was only seen by PW6-Kharak Singh. The statement of PW4-Soban Ram reveals that he was at his house at the time of incident when he was coming to fetch the water from the tank he heard the noise. It is also in the evidence that the fields are situated in the hilly terrain and the obstructions are there. It was admitted that there are certain trees standing on the field nearby the tank. However, the investigating officer had denied this fact in his cross examination. It is also evident from the statement of PW1-Ram Singh that PW4- Soban Ram reached at the spot after the incident. PW6-Kharak Singh has not been produced before the court below. In view of this fact it can be said that there is a long-standing enmity between the parties, as such, the evidence of the prosecution is not credible and cogent. The defence has adduced the evidence of DW1-Bhagirathi Devi who has stated in support of the contention of the appellant.

18. On consideration of the totality of facts, circumstances, evidence and the material on record, I am of the considered opinion that the prosecution has not been established the guilt beyond reasonable doubt. The appellant is entitled to get the benefit of doubt. The learned trial Judge erred in holding that the prosecution had established the guilt against the appellant beyond reasonable doubt. The appeal thus succeeds and is liable to be allowed accordingly.

19. The appeal is thus allowed. The conviction and sentence awarded to the appellant per judgment and order dated

03.02.1982 passed by the Sessions Judge, Pithoragarh, is set aside. The appellant-Raghubar Singh is acquitted of the charges levelled against him. The appellant is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged. The appeal has already been abated against the appellant No.2-Har Singh vide court's order dated 26.10.2005.

20. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within five months.

(J.C.S. RAWAT, J.)

04th March, 2006
Shiv